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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 66

RIVERBANK LABORATORIES, a corporation,
Petitioner,

vs.

HARDWOOD PRODUCTS CORPORATION, a corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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CITATION TO OPINION BELOW.

The opinion of the Court of Appeals is printed in the record. (R. 211.) The decision is reported at 220 F. 2d 465 (C. A. 7th, 1955).

JURISDICTION.

The judgment of the Court of Appeals was entered on March 18, 1955. (R. 216.) Rehearing was denied on April 12, 1955. (R. 217.) The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). The petition for certiorari was filed May 11, 1955, and was granted October 10, 1955.

QUESTIONS PRESENTED.

1. In a diversity case, is a foreign corporation's defense of "not doing business" to be tested by the new due process principles of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) and related cases,[1] or is it governed under the *Erie* rule by state court decisions on procedural due process antedating the new principles?

2. Under the *International Shoe* doctrine, and in view of the enactment of §1404(a) of the Judicial Code, 28 U. S. C. §1404(a), should not a defendant's assertion of "not doing business" be now addressed solely to the question of whether the proceeding should be transferred to another federal district or division, not to the question of dismissal?

3. Was not the Court of Appeals clearly in error, under the *Erie* rule, in improperly and mechanically construing the Illinois decisions and in failing to apply the settled Illinois doctrine that a foreign corporation committing a tort in Illinois against an Illinois citizen may be sued there?

STATEMENT.

Plaintiff (Riverbank) is an Illinois not-for-profit institution of international scientific repute and standing since 1921 in the physical sciences, specializing in the field of acoustics. (R. 141.) It is affiliated with the Armour Research Foundation of the Illinois Institute of Technology. (R. 184.) Incident to its research activities, plaintiff developed a unique sound insulating door for which it obtained a patent. (R. 143.) The defendant (Hardwood), a Wisconsin corporation domiciled at Neenah,[2] not qualified

1. *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643 (1950); *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437 (1952).

2. Located in the Eastern District of Wisconsin which is centered at Milwaukee, ninety miles from Chicago.

to do business as a foreign corporation in Illinois, was licensed in 1936 by plaintiff to produce doors covered by the patent and thereafter sold them under the name "Riverbank Sound Insulating Door". (R. 144.) After expiration of the patent and termination of the license, the defendant, without authorization from the plaintiff, continued to exploit plaintiff's name, "Riverbank", in marketing the doors (R. 145-146); and from its Acoustical Department, which was located in Chicago, Illinois (R. 149) continued to solicit sales in Chicago and elsewhere of Riverbank Sound Insulating Doors by means of trade circulars emphasizing the reputation of plaintiff, Riverbank Laboratories. (R. 147-150.) Plaintiff instituted suit on February 25, 1954, in the United States District Court for the Northern District of Illinois, Eastern Division [at Chicago], to enjoin defendant from the unauthorized use of plaintiff's name. (R. 3, 157.) Process was served at defendant's Chicago office upon its Chicago manager, a resident of Chicago who had held that position for nearly thirty years. (R. 16, 78.) On March 24, 1954, defendant moved to dismiss on the ground that it was not "doing business" in Illinois. (R. 15.) Supporting and opposing affidavits were filed (R. 16, 18, 136) and depositions were taken at the instance of plaintiff (R. 20-135), from which it appeared that:

(a) Defendant was actively engaged—despite the termination of its right to use plaintiff's name "Riverbank"—in trading upon that name in the solicitation by its Chicago office (designated by defendant as its Acoustical Department) of door sales to customers in Chicago and elsewhere. (R. 145-150.)

(b) Defendant had maintained a Chicago office for more than thirty years (R. 77), paying the rent therefor and bearing all expense (R. 84-86); its name was painted on the office door, appeared on the directory in the lobby of the building, and was listed in the Chicago telephone directory. (R. 16.)

(c) Its Wisconsin home office letterhead contained the legend "Chicago office, 75 East Wacker Drive" (R. 139); its trade circulars listed its principal office as Neenah, Wisconsin, and its "Acoustical Department" at Chicago, Illinois. (R. 149.)

(d) It shipped merchandise from Wisconsin into Illinois continuously over a long period of years in amounts exceeding $100,000 annually (R. 83); since 1936 it had made royalty payments to its licensor in the State of Illinois averaging over $3,000 per month. (R. 30, 137.)

(e) It had written agreements with Illinois corporations providing for encasing of its sound insulating door units into fireproof doors which were manufactured in Illinois. (R. 31-34, 138-139.)

(f) It contracted with an Illinois partnership for the manufacture in the State of Illinois continuously since 1936 of threshold closers for use in connection with defendant's insulating doors, and issued written instructions for shipment of the closers from Illinois to defendant's consignees in other states; it paid for the closers by delivering its checks therefor each month to its contractor in Illinois. (R. 26, 137-138.)

(g) An important part of the duties of defendant's Chicago manager was to make drawings and sketches, to consult with architectural and engineering firms, to prepare a manual for use in the trade, to carry on correspondence and to investigate complaints, all related to the installation and servicing of defendant's doors in Chicago, Illinois (R. 30, 65, 70-71, 90-91); and the Chicago manager also had jurisdiction of sales agents in a large territory outside of the State of Illinois. (R. 29.)

On consideration of the foregoing facts, the District Judge, on June 3, 1954, overruled the motion to dismiss and proceeded to consider the merits of plaintiff's application for a preliminary injunction. A preliminary injunction was entered on June 18, 1954, restraining the defendant from using the name "Riverbank". (R. 192.) An

interlocutory appeal was taken by defendant on June 18, 1954 to the Court of Appeals for the Seventh Circuit. (R. 197.) The Court of Appeals did not adjudicate the case on the merits but reversed the District Court on the ground that the venue (*sic*)[3] was improper because the defendant was a foreign corporation "not doing business in Illinois". (R. 213.) In arriving at this result, the Court of Appeals did not apply the new due process principles enunciated in the *International Shoe* and subsequent cases, but instead held that the "not doing business" defense must be tested by Illinois decisions, stating:

> "In *Canvas Fabricators* and in *Roberts* we pointed out that in diversity cases the law of Illinois must control and that decisions by the Illinois Supreme Court such as *G. W. Bull & Co.* v. *Boston & Maine R. R. Co.*, 344 Ill. 11, 175 N. E. 837, and *Booz* v. *Texas & Pacific Ry. Co.*, 250 Ill. 376, 95 N. E. 460, establish the rule that a defendant is not subject to process in Illinois if it was not engaged in business in that state in any way other than the solicitation of orders to be accepted or rejected elsewhere." (R. 213.)

SUMMARY OF THE ARGUMENT.

1. The defense of "not doing business" raises questions of federal constitutional law only. The *Erie* rule is inapplicable because there is no independent state law or policy on "doing business". All the Illinois decisions, including those cited by the court below as establishing a separate state rule, involved solely the federal question of due process under the Fourteenth Amendment. No state would close its courts to its own citizens, forcing them to sue foreign corporations away from home, when not constitutionally compelled to do so.

3. Since this is a diversity case, and the suit was brought in the judicial district where the plaintiff resides, all technical requirements of real "venue" were satisfied. 28 U. S. C. § 1391(a). See *Camp* v. *Gress*, 250 U. S. 308 (1919).

2. The "doing business" rule, like §1404(a), affects only the place of trial within the federal court system and not the ultimate result. It is "procedural" under the test laid down in *Guaranty Trust Co.* v. *York.* These cases in federal courts should be governed by §1404(a).

3. The application of state decisions on "doing business" by virtue of Rule 4(d)(7), Fed. Rules Civ. Proc., as in *Pulson* v. *American Rolling Mill Co.,* is erroneous. Not only does the *Pulson* theory strain the language of the Rule beyond pure formal details of method, but it would result in applying state "doing business" decisions in federal question cases.

4. The court below misconstrued the Illinois decisions. The Illinois rule of "doing business" is identical with the federal rule. Moreover, the court below failed to apply the settled state rule that a corporation is "doing business" where the subject matter of the suit arises out of its activities within the state.

ARGUMENT.

I.

The Defense of "Not Doing Business" Involves Solely Principles of Federal Constitutional Law. There Is No "State Law" of "Doing Business". The Erie Rule Therefore Cannot Be Applicable.

The Background to International Shoe.

A striking difference has existed under service of process rules between suits against natural persons and suits against business corporations. Natural persons have always been suable wherever tagged[4] by the process server; regardless of the distance of the forum from the defendant's domicile or the inconvenience of the forum to him, no constitutional question arose to disturb the plaintiff's selection of the forum.[5] On the other hand, a business

4. It is interesting to reflect on the fact that the tagging mechanism for initiating legal proceedings seems historically to have preceded the development of a sound and reliable postal system. The waste in communicating the initiation of legal proceedings through the tagging technique and in the judicial system's maintenance of a private army of process servers is appalling. Even in the non-resident motorist statutes the fiction of the tag is preserved although actual notice is conveyed by registered mail. *Hess* v. *Pawloski*, 274 U. S. 352 (1927). The postal registry system was not inaugurated until 1872. R. S. Sec. 3926 (Act June 8, 1872, c. 335, §§ 126, 129, 17 Stat. 300); 39 U. S. C. § 381. For a review of colonial history of the postal system, see *U. S.* v. *Kochersperger*, 26 Fed. Cas. No. 15, 541 at 803 (E. D. Pa. 1860). The tagging rule gives rise to special problems where in a complicated case involving many defendants not all are taggable in the same place. Extra-territorial tagging is not permitted except under special circumstances. *Smith* v. *Grady*, 68 Wis. 215, 31 N. W. 477 (1887).

5. *Harris* v. *Balk*, 198 U. S. 215 (1905). See *Peabody* v. *Hamilton*, 106 Mass. 217 (1870), (non-resident defendant served on

corporation, though likewise tagged by a process server at the forum of plaintiff's selection, has been given a privilege or option to resist suit at that place if it is "not doing business" there.[6] This privilege, it must be emphasized, is not derived from any rule or principle of state substantive law, but is a rule of procedural due process of law under the federal constitution. *Riverside and Dan River Cotton Mills* v. *Menefee*, 237 U. S. 189 (1915); cf. *St. Clair* v. *Cox*, 106 U. S. 350 (1882). This rule has its origins in conceptual difficulties once thought formidable to the recognition of any legal existence of a corporation outside the territorial boundaries of the state which created it.[7] See Henderson, *The Position of Foreign Corporations in American Constitutional Law*, Ch. 5 (1918). It is a rare example—perhaps the only one known—of a constitutional privilege developed solely for foreign corporations not equally applicable to natural persons. At any rate the

board ship in Boston Harbor while enroute from Nova Scotia to New York); *Fisher, Brown & Co.* v. *Fielding*, 67 Conn. 91, 34 Atl. 714 (1895), (defendant was an alien transiently stopping at a hotel).

6. Compare *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516 (1921) and *James-Dickinson Farm Mortgage Co.* v. *Harry*, 273 U. S. 119 (1927) with *Harris* v. *Balk*, *supra* note 5. In the *James-Dickinson* case, service upon the president of a foreign corporation who was temporarily present within the state was held proper as to him personally but not as to the corporation. Presumably this would apply to a president-sole stockholder.

7. Another point is sometimes made. If the plaintiff effects service on some obscure employee of a foreign corporation who lacks the intelligence, discretion or will to report the episode to superiors through internal channels of communication, the defendant may, through ignorance, default and, if so, it will have been denied a day in court and due process of law. To create a due process problem in this fashion means that a corporate defendant not ignorant of the suit but, on the other hand, fully informed about it—here even defending and losing the case on the merits—is permitted to come into court through selected counsel carrying extensive affidavits in order to plead a purely hypothetical case. In this connection it should be noted that in two leading cases in this field, the *Rosenberg* and *James-Dickinson* cases, cited note 6, *supra*, service was on the president of the corporation.

corporate bar was quick to exploit to the fullest the opportunities that such a constitutional privilege afforded. Through easy planning of such petty details as standard clauses in printed order blanks requiring acceptance of sales drummers' orders at the "home office", the indirect instead of the direct handling or bearing of the costs of local offices, directory and telephone listings and services and the like by arranging for the handling of them through local representatives and agents and by reflecting these costs in compensation rates or reimbursements, and through the management or planning of similar formalities, a significant measure of immunity from suit in large areas of the country was achieved, both against state tax and regulatory agencies and local residents.

The trial of "doing business" questions and the survival of such a point, even after decision of the case on the merits—as here—contributed much in the way of delay, expense and traps to a system already heavily encumbered with all three. Because of the great number of cases involving foreign corporations, the point is litigated constantly and is of great day-to-day significance to the courts and the bar. The Court of Appeals for the Second Circuit has aptly observed: "The published decisions on what constitutes 'doing business' in a state by a foreign corporation are literally legion." *Echeverry* v. *Kellogg Switchboard & Supply Co.*, 175 F. 2d 900, 902 (C. A. 2nd, 1949.) In any event, a one-sided privilege to control the place of suit introduced complicating, strategic and psychological factors into the processing of an aggrieved local citizen's claim for redress. It may even have contributed much to the clogging of court calendars in a few large metropolitan centers, where foreign corporations are subject to suit without an independent trial, often as time consuming and as expensive as the main one itself. Some state legislatures, in seeking ways to enable their citizens to

obtain redress at home for the injuries they may have suffered from foreign corporations untouchable locally, have hit upon the device of "direct action" against non-immune insurance companies; they have thus done violence to conventional legal theory, producing harder and more serious constitutional questions than those which gave rise to the problem in the first place. See *Watson* v. *Employers Liability Assurance Corp., Ltd.*, 348 U. S. 66 (1954).

In recognition of this state of affairs, the Supreme Court in the *International Shoe* and related cases finally adopted a wholly new approach to the due process questions underlying the "doing business" rule. The court stated (326 U. S. at 317, 319-320 (1945)):

> "[T]he demands of due process * * * may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection * * * It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. * * * Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations * * * It is evident that [defendant's] operations establish sufficient contacts or ties with the state of the forum to make it

reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure."

Subsequent Developments.

Since *International Shoe*, two major developments have taken place:

1. Section 1404(a) of the Judicial Code, 28 U. S. C. § 1404(a), was enacted by Congress in 1948, conferring discretion on the District Judges of the United States courts to transfer actions from one district or division to another "in the interest of justice". The criteria for judgment under § 1404(a) resemble, if they do not directly parallel, those under *International Shoe*. Judge Learned Hand in *Kilpatrick* v. *Texas & P. Ry. Co.*, 166 F. 2d 788, 791 (C. A. 2nd, 1948) found these criteria to be "indistinguishable". An important difference, however, exists in the remedy. The remedy under § 1404(a) is transfer to another federal district where the interests of justice require that result, whereas under *International Shoe* the only remedy heretofore has been thought to be dismissal. Thus, there are now thought to be two separate, co-existing rules directed to the same problem, with parallel criteria or standards but with different consequences.[8]

2. In spite of both § 1404(a) and *International Shoe*, the new standard has not been used at all in diversity

8. The difference between disposition under § 1404(a) on the one hand or under the "doing business" rule on the other is substantial. Transfer under § 1404(a) does not reopen the statute of limitations against the plaintiff. Transfer is discretionary and may not be reviewable. *Cf. Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955). In any event, the point would not appear to survive disposition of the case below on the merits.

cases in most of the circuits.[9] It was noticed shortly after *International Shoe* and related cases were decided that they all involved appeals from state Supreme Courts, not diversity cases, and most of the circuits went on from there to hold the *Erie* rule applicable to the problem in diversity cases. The result has been that obsolete federal interpretations of due process, as reflected in state decisions preceding *International Shoe*, have been applied to the "not doing business" defense in diversity cases brought in or removed to the federal courts. Thus, the old "doing business" rule as it existed before *International Shoe* and before § 1404(a) is still the basis for decision in these cases, as it was in the Seventh Circuit in this case.[10]

9. Confusion tantamount to conflict exists in the circuits. The prevailing rule applying state law is taken in the First, Fifth and currently (see note 10) in the Seventh. *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193 (C. A. 1st, 1948); *Rosenthal* v. *Frankfort Distillers Corp.*, 193 F. 2d 137 (C. A. 5th, 1951); *Canvas Fabricators, Inc.* v. *William E. Hooper & Sons Co.*, 199 F. 2d 485 (C. A. 7th, 1952). The judges in the Third Circuit seem to be split among themselves. See *Partin* v. *Michaels Art Bronze Co.*, 202 F. 2d 541 (C. A. 3rd, 1953). The Second Circuit appears to have a different rule for removal cases than for cases originally filed in the federal courts. Compare *Bomze* v. *Nardis Sportswear, Inc.*, 165 F. 2d 33 (C. A. 2nd, 1948) with *Satterfield* v. *Lehigh Valley R. Co.*, 128 F. Supp. 669 (S. D. N. Y., 1955) and *Nugey* v. *Paul-Lewis Laboratories*, 132 F. Supp. 448 (S. D. N. Y., 1955). The Sixth Circuit apparently follows the *International Shoe* rule. *Scholnik* v. *National Airlines, Inc.*, 219 F. 2d 115 (C. A. 6th, 1955), *cert. den.* 349 U. S. 956 (1955), relying upon two earlier decisions of the same court and a decision of the Court of Appeals for the District of Columbia which clearly did not involve Ohio state law. See also *Electrical Equipment Co., Inc.* v. *Daniel Hamm Drayage Co.*, 217 F. 2d 656 (C. A. 8th, 1954); *Woodworkers Tool Works* v. *Byrne*, 191 F. 2d 667 (C. A. 9th, 1951); *Kahn* v. *Maico Company*, 216 F. 2d 233 (C. A. 4th, 1954).

Moore regards the *Erie* rule as inapplicable. Moore's Federal Practice, Sec. 4.25 (2d Ed., 1948).

10. In an earlier case, the Seventh Circuit (Evans, Major and Minton, JJ. sitting) tested the defense only by *International Shoe* standards without the use of Illinois law. *Clover Leaf Freight Lines, Inc.* v. *Pacific Coast Wholesalers Assn.*, 166 F. 2d 626 at 630-631 (C. A. 7th, 1948), *cert. den.* 335 U. S. 823 (1948).

The Polizzi Case.

The Supreme Court has yet to decide whether the new principles of *International Shoe* or the new approach of § 1404(a) apply in diversity cases where the "not doing business" defense is raised, or whether the circuits are right in testing the defense, not by either of those standards, but by obsolete federal law, as reflected in state court decisions preceding *International Shoe*. This question appears to have been expressly left open in *Polizzi* v. *Cowles Magazines, Inc.*, 345 U. S. 663 (1953). In that case, two justices took no part in the consideration or decision. Of the other seven members of the Court, a majority of four held that the courts below had improperly analyzed the question involved under the venue statute which those four justices held to be inapplicable. The majority so holding therefore refrained from touching either the "doing business" question within the meaning of *International Shoe* and related cases or the applicability of § 1404(a). Three justices, concurring in part and dissenting in part, thought the Supreme Court should have decided the "doing business" question on the basis of the new principles of *International Shoe* and § 1404(a). Those justices left no doubt that in their opinion the new principles were applicable in diversity cases. One of their opinions emphasized that § 1404(a) now bore heavily on the present status of the "doing business" rule in diversity cases and this opinion implied that an independent "doing business" rule in the federal courts may now, in view of § 1404(a), be unnecessary and non-existent. Disposition of the "doing business" cases under § 1404(a), as suggested in that concurring opinion, would, for the first time, put natural persons and corporations in exactly the same constitutional position under service of process rules. Such a standard would make transfer from one federal court to another, rather than dismissal, the only appropriate remedy where a defendant's claim has merit. Several courts have since picked up this theme. See *Scholnik* v. *National Air-*

lines, Inc., 219 F. 2d 115, 120 (C. A. 6th, 1955), cert. den. 349 U. S. 956 (1955); *Magnetic Engineering & Mfg. Co.* v. *Dings Magnetic Separator Co.*, 86 F. Supp. 13, 17 (S. D. N. Y., 1949), appeal dismissed 178 F. 2d 866 (C. A. 2nd, 1950); *Kendrick* v. *Seaboard Air Line R. R.*, 98 F. Supp. 372, 373 (E. D. Pa., 1949); *Cooke* v. *Kilgore Mfg. Co.*, 105 F. Supp. 733, 738 (N. D. Ohio, 1952).

Only Federal Constitutional Law Is Involved.

The prevailing view of the circuits in treating the question in diversity cases as governed by the *Erie* rule is plainly wrong. The "state law" so applied under the *Erie* rule is nothing but federal constitutional law. For example, the two state court decisions relied upon by the Court of Appeals for the Seventh Circuit in this and its companion decisions on the point are predicated exclusively on now-antiquated procedural due process grounds under the federal constitution and involve interpretation and application of United States Supreme Court decisions antedating *International Shoe* and related cases. *See Bull & Co.* v. *Boston & Maine R. R.*, 344 Ill. 11, 22, 175 N. E. 837, 841 (1931) and *Booz* v. *Texas & Pacific Ry. Co.*, 250 Ill. 376, 381, 95 N. E. 460, 461 (1911). Apart from due process considerations under the federal constitution, there are no independent state law reasons or grounds for the "doing business" rule.

Though it is apparent from the *Bull* and *Booz* decisions on their face that they are grounded solely upon federal due process considerations, in the leading Illinois case of *Pembleton* v. *Illinois Commercial Men's Association*, 289 Ill. 99, 107-108, 124 N. E. 355, 359 (1919), cited and relied upon in the *Bull* case, the Illinois Supreme Court expressed itself in the clearest possible terms on this point as follows:

"The decisions in this state as to due process of

> law under the Fourteenth federal amendment must be controlled by the decisions of the federal courts rather than by the decisions of our own or other state courts. * * * It is our duty under the law to overrule, if necessary, even our own decisions and follow the rule laid down by the federal Supreme Court in matters of this kind."

Further, in *Darling & Co.* v. *Rauh & Sons Fertilizer Co.*, 242 Ill. App. 375, 378 (1926), the Illinois Appellate Court stated:

> "The Supreme Court decisions are binding upon the courts of this state for the reason that they define what is 'due process of law' under the federal constitution."

A pyramid of Illinois cases citing each other, all antedating *International Shoe*, create an illusion of a separate body of state precedent, but, as indicated, each and every one of the decisions is predicated upon United States Supreme Court decisions, likewise antedating *International Shoe*, on federal constitutional law. The use of state law thus produces a kind of stunted renvoi.

This is not merely true in Illinois but, we contend, is universally true. There is no independent state law or policy on "doing business".[11] Not only is there not any separate state policy on this question, but it appears to be demonstrable that none would exist. Would any state affirmatively seek to adopt a stricter rule of "doing business" than is required by federal due process of law, in order thereby to deny its own citizens access to its courts in seeking redress against foreign corporations—that is, close its courts to its own citizens when a due process test of fairness does not require it to do so? Traditionally

11. For other state cases indicating that only a federal question is involved, see *American Asphalt Roof Corporation* v. *Shankland*, 205 Iowa 862, 219 N. W. 28, 60 A. L. R. 986 (1928); *Harrison* v. *Corley*, 226 N. C. 184, 37 S. E. 2d 489 (1946).

states have sought to extend their jurisdiction over foreign corporations for the benefit of local residents, not to restrict it.[12] See, *e.g., Davis* v. *Farmers' Co-op. Equity Co.*, 262 U. S. 312 (1923). Direct action statutes and related legislation are born of such a policy, as this Court itself recognized, and are totally inconsistent with the idea of a restrictive state policy. *Watson* v. *Employers Liability Assurance Company, Ltd.*, 348 U. S. 66 (1954). A state may attempt to deny remedies to unlicensed foreign corporations in its courts to police its licensing and qualification laws, or it may attempt to deny non-resident citizens access to its courts against foreign corporations on matters unrelated to the state, but these are indeed altogether different matters than denial to its own citizens of access to its courts.

Since no affirmative state policy is involved, recent cases, such as *Angel* v. *Bullington*, 330 U. S. 183 (1947); *Woods* v. *Interstate Realty Co.*, 337 U. S. 535 (1949); and *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530

12. Should any state, contrary to the evidence of the past and common sense, actually adopt a policy of declining jurisdiction in proceedings instituted by its own citizens, such a state would appear to be adopting a *forum non conveniens* rule couched in jurisdictional, instead of discretionary, terms. Even though states have adopted *forum non conveniens* rules only in rare instances, the question arose before the enactment of § 1404(a) of whether the *Erie* rule applied to state law on *forum non conveniens*. It was held that it did not. *Gilbert* v. *Gulf Oil Corporation*, 153 F. 2d 883 (C. A. 2nd, 1946). This question was mooted by the Supreme Court in *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501, 509 (1947) See also *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549, 558-559 (1946). Section 1404(a) of the Judicial Code is generally conceded as having resolved the entire question. See Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 927-30 (1947). If § 1404(a) preempts the entire field as to the discretionary form of *forum non conveniens*, it would appear likewise to do so as to any special variant of it, even though couched in jurisdictional terms. Otherwise § 1404(a) in the federal courts could, in effect, be vetoed or nullified by the states through a formalistic use of jurisdictional vocabulary.

(1949), all involving escape from affirmative state policies through use of federal law in diversity cases, are not here applicable.

What is involved in these cases is federal constitutional law in the field of procedural due process, as to which the Supreme Court of the United States and not the Supreme Court of any state is the final arbiter. The *Erie* rule, therefore, should have no application. *Cf. State Tax Commission* v. *Van Cott*, 306 U. S. 511 (1939) and *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 120 (1924).

One final point remains by way of summary. Some of the circuits have approached the "doing business-*Erie* rule" problem in terms of a double question—first, is jurisdiction possible under the constitutional test of fairness laid down by *International Shoe*, and second, has the state involved chosen as a matter of its own policy to exercise its maximum constitutional jurisdiction? See *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193 (C. A. 1st, 1948) and *Roberts* v. *Evans Case Co.*, 218 F. 2d 893, 895 (C. A. 7th, 1955). In the light of what has been said, this dichotomy is a false one. The first of these questions is pure federal constitutional law of due process. As to the second question, as demonstrated above, the states have not nor is it common sense to expect them to close their courts to their own citizens, thus forcing them to seek redress against a foreign corporation away from home when the due process test of fairness does not compel this result.

II.

Integration of International Shoe and § 1404(a) Produces A New Characterization in the Federal Courts.

Furthermore, if the test of the *Erie* rule's applicability under *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109 (1945) is whether disregard of state law would "signi-

ficantly affect the result of a litigation", it should be noted that the "doing business" rule touches the place of trial within the federal court system, not the ultimate result. In these terms the issue in this diversity case at Chicago is whether it should be refiled at or transferred to Milwaukee. As the concurring opinion in the *Polizzi* case suggests, the "doing business" rule now resembles or parallels § 1404(a) of the Judicial Code in that it regulates not the flow of cases as between state and federal courts or the volume of diversity business in the federal courts, but only the allocation of a given volume of diversity business as between different districts within the federal court system.

If § 1404(a) and the "doing business" rule are both viewed as techniques for the administration of judicial business within the federal court system, the practical consequences of the decision below should be noted. This case was heard on the merits by the District Judge at Chicago and was before the Court of Appeals for review on the merits. The Court of Appeals decision means that the case must be retried by another federal district court at Milwaukee, Wisconsin, ninety miles away, which is within the same circuit, so that it eventually can return to the same Court of Appeals for review on the merits. The parties have thereby been subjected to unnecessary delay and expense, and the federal court system to unnecessary burdens.

As previously indicated at page 11 above, the criteria of § 1404(a) and the tests of *International Shoe* appear to be identical. Yet, in the federal court the indistinguishable, parallel criteria produce different results—transfer under the one, as compared with dismissal under the other. It may not be too much to suggest that the "doing business" rule may no longer have independent existence—apart from the remedy under § 1404(a)[13]—in the federal courts.

13. § 1404(a) requires no gloss by way of legislative history. See *Ex parte Collett*, 337 U. S. 55, 61 (1949).

If a defendant's claim has merit in a particular case, transfer to another federal forum under § 1404(a) permits exact justice to be done for both parties. See Black, *J.* in *Polizzi* v. *Cowles Magazines, Inc.*, 345 U. S. 663, 667 (1953); *Scholnik* v. *National Airlines, Inc.*, 219 F. 2d 115, 120 (C. A. 6th, 1955), cert. den. 349 U. S. 956 (1955). The states cannot avail themselves of this superior remedy because of the lack of administrative machinery necessary to effectuate it, whereas such machinery is inherent in a federal court system.

III.

Federal Rule 4(d)(7) Does Not Require the Application of State Law.

At least one circuit has brought state law to bear on "doing business" in diversity cases, not under the *Erie* doctrine, but by virtue of Rule 4(d)(7) of the Federal Rules of Civil Procedure. *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193 (C. A. 1st, 1948). A word, therefore, should be added to put this point at rest. That rule authorizes service of process "in the manner prescribed by the law of the state in which the service is made * * *." In the *Pulson* case, the word "manner" was held to bring in the state "doing business" rule. See *Kenny* v. *Alaska Airlines, Inc.*, 132 F. Supp. 838 (S. D. Cal., 1955).

It is self-evident that Rule 4(d)(7) regulates only technical details of method; jurisdiction and venue questions receive separate treatment in the Judicial Code. Further, the *Pulson* view proves too much. Under that decision, state law on "doing business" would necessarily be determinative of federal jurisdiction in federal question as well as diversity cases, since Rule 4(d)(7) quite clearly applies indiscriminately to both classes. Other courts, we suggest, have properly rejected the *Pulson* view and have

limited the scope of Rule 4(d)(7) to technical details of who, how, when and where. *Scholnik* v. *National Airlines, Inc.*, 219 F. 2d 115 (C. A. 6th, 1955), cert. den. 349 U. S. 956 (1955); *Moore* v. *Atlantic Coast Line R. Co.*, 98 F. Supp. 375 (E. D. Pa., 1951); *Allegue* v. *Gulf and South American S. S. Co., Inc.*, 103 F. Supp. 34 (S. D. N. Y., 1952). It should be noted, finally, that all arguments negating the existence of a separate state rule of "doing business" are equally valid against the *Pulson* theory.

IV.

Even if the Erie Rule Requires Reference to Illinois Decisions, the Court of Appeals Misapplied Both the Rule and the Law of Illinois.

The Erie Rule Does Not Call for the Mechanical Application of Old State Court Decisions in a Field Undergoing Reconsideration and Re-evaluation.

This Court has made it plain that a federal court sits in a diversity suit as just "another court of the state". But it is equally plain that a federal court so sitting is expected to decide questions of state law as they would currently be decided by the highest courts of the state involved. Not all questions of state law admit of ready and easy answers, and craftsmanship may necessarily be required in the application of precedent under changing circumstances, especially in a field of law undergoing intensive current re-evaluation and reappraisal of underlying policies. These cases *ex hypothesis* involve diversity conditions and they are therefore either brought in or removable to the federal courts. As a result, there has been no appellate decision in Illinois since *International Shoe* on the point, despite the extraordinary volume of cases presenting the question in the federal courts of the area. The Illinois

cases preceding *International Shoe* all turn on federal due process doctrine, as reflected in United States Supreme Court decisions prior to the fundamental reconsideration and re-evaluation of the underlying constitutional principles in *International Shoe*. The Court of Appeals here and in its companion cases on the point did not view Illinois law as living and changing as underlying policy is re-evaluated and changes. Instead, the Court of Appeals mechanically applied the old pre-*International Shoe* cases as though they necessarily froze the law of Illinois, without regard to shifting policy and re-evaluation by the Supreme Court as the original author of those policies, until those decisions were changed by Illinois itself. Compare Wyzanski, *The Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281, 1299-1301 (1952). *Cf. King* v. *Order of United Commercial Travelers of America*, 333 U. S. 153 (1948).

Closer scrutiny of the Illinois decisions reveals that the Illinois rule of "doing business" is identical with the federal rule and changes with it. In *Pembleton* v. *Illinois Commercial Men's Association*, 289 Ill. 99, 124 N. E. 355 (1919), in a passage quoted at pages 14-15, *supra*, of this brief, the Illinois Supreme Court indicated that, as to questions of "doing business", Illinois courts were bound to follow the decisions of the United States Supreme Court, even where this necessitated overruling decisions of Illinois courts. Accord: *Darling & Co.* v. *Rauh & Sons Fertilizer Co.*, 242 Ill. App. 375 (1926). If the case at bar had been brought in a state court, that court would have been bound under the *Pembleton* case to apply the new *International Shoe* standards. Since the federal court in Illinois must under the *Erie* rule act as "only another court of the state", it must likewise apply the present federal rule of "doing business".

The present vitality of the *Pembleton* doctrine in the law of Illinois is demonstrated by the new Illinois Civil Practice Act, approved July 19, 1955, after the Court of Appeals decision here, and effective January 1, 1956. Under Section 17(1)(a) of that Act, state policy in this field clearly is to assume jurisdiction wherever that may be done consistent with due process of law. See Joint Committee Comments in Smith-Hurd, Ill. Ann. Stat., Ch. 110, § 17(1) (1955). If such a pronouncement of state law had been made by the Supreme Court of Illinois while this case was pending, all federal courts would be required to apply it at any level of the proceedings. *Vandenbark* v. *Owens-Illinois Glass Company*, 311 U. S. 538 (1941); *Huddleston* v. *Dwyer*, 322 U. S. 232 (1944). A statute merely codifying existing case law into a procedure code would seem to be *a fortiori*.

Under Illinois Decisions a Foreign Corporation Is Suable on Torts Committed in Illinois.

Furthermore, the Court of Appeals did not mention or face up at all to the point that this suit charges, and the District Judge actually enjoined, a tort committed in the State of Illinois—the unlawful exploitation of plaintiff's name there. The activities which were the subject matter of the injunction were not only going on in Illinois, but were actually centered in and emanated from Illinois where the Acoustical Department of the defendant's business is headquartered. It has always been the law of Illinois that its citizens will not be sent "to a foreign jurisdiction in quest of redress for injuries committed here". *Edwards* v. *Schillinger*, 245 Ill. 231, 238, 91 N. E. 1048, 1050 (1910); *Pergl* v. *U. S. Axle Co.*, 320 Ill. App. 115, 50 N. E. 2d 115 (1943).[14] Even the pre-*International Shoe*

14. The rule permitting a foreign corporation to be sued in Illinois on torts committed there is likewise codified in Section 17(1)(b) of the new Illinois Civil Practice Act.

due process rule never prevented this result in Illinois or anywhere. "Presence," said the Court in the *International Shoe* case, "has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on * * *." 326 U. S. 310, 317.

CONCLUSION.

It is apparent from the recital of the undisputed facts in the Statement that the tests of *International Shoe* for the retention of this case in Chicago are easily and quickly met. The character of the defendant's ties, contacts and relations to the forum make it fair and reasonable to subject it to suit there. Such was the holding of the District Judge in denying defendant's motion to dismiss. (R. 183.) He proceeded to try the merits of plaintiff's application for a preliminary injunction and granted such an injunction.

For the foregoing reasons, the decision of the Court of Appeals should be reversed and the case should be remanded to that court with instructions to consider and adjudicate the case at last on the merits of the injunction order itself.

Respectfully submitted,

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